

IN THE HIGH COURT FOR ZAMBIA

2019/HP/0392

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

LOMANZI BANDA
DAVIS MWAPE



1ST PLAINTIFF
2ND PLAINTIFF

AND

DOUBLE IMPACT CONSTRUCTION LIMITED
RONGHUA ZHANG
HAO YU

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

Before the Honourable Lady Justice Ruth Chibbabbuka on the 17th day
of October, 2019

For the Plaintiffs:

Ms M.M. Mushipe, Messrs Mushipe &
Associates

For the Defendants:

Ms. S. Kalima, Messrs J & M Advocates

RULING

Cases referred to:

1. *Greyford Manda vs. Winstone Chibwe* (sued in his capacity as Secretary General of United Party for National Development) Appeal No. 98 of 2013.
2. *American Cynamid vs Ethicon Ltd* (1975) AC 396
3. *Shell & BP Zambia Ltd vs Conidaris & Others* (1975) ZR 174
4. *Preston vs. Luck* (1884) ChD 497
5. *Ndove vs National Educational Company Zambia Limited* (1980) ZR 184
6. *Kekelwa Samuel Kangwa vs David Nkhata* Appeal No. 102 of 2013

Legislation referred to:

High Court Act, Chapter 27 of the Laws of Zambia

The plaintiffs by an application for an injunction made pursuant to Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia, seek an order against the 1st defendant for the following reliefs;

- a) *To restrain the 1st defendant by itself or otherwise from continuing to discharge water, emissions and effluent and or interfering with the plaintiff's quiet enjoyment of their property known as plot 284/M Lusaka West; and*
- b) *The defendants remove the pipe discharging water, emissions and effluent onto the plaintiffs' property pending determination of the matter.*

The plaintiffs filed an affidavit in support of their application dated 15th March, 2019. According to the said affidavit, sometime between June and December, 2016, the 1st defendant dug a tunnel on its property for purposes of mining stones and quarry dust. The tunnel has since been filled with rain and underground water and has resulted in the defendants failing to conduct their mining activities. The defendants have gone on to illegally and negligently place a large pipe for purposes of draining water from the said tunnel and discharging it onto the plaintiff's land. This has caused a water reservoir or dam to be created on the plaintiff's property which has led to the destruction of their property.

The said spillage of water has created ditches, craters and other depressions which were filled up with water in November, 2017 and led to the drowning of Davis Mwape Junior, aged five years a grand child to the 1st plaintiff and 1st born son of the 2nd plaintiff. The 1st defendant's Directors fired warning gun shots in the air when the plaintiffs peacefully approached the 1st defendant to complain about the water spillage on the plaintiffs' property.

In spite of reporting the matter to the police, the police have not opened a docket. As a result the plaintiffs' properties have been submerged in water and the pit latrines are over flooding resulting in the plaintiffs' family being susceptible to diseases and losing mesne profits on leased out properties.

The defendants have continued to ignore the plaintiffs' plea to remove the water pipe. As a result the plaintiffs' property is being damaged.

That an injunction be issued pending the determination of the main matter.

In opposing the application the 2nd defendant Zhang Rong Hua deposed and swore an affidavit filed on the 9th October, 2019. According to that affidavit he avers that all activities conducted by the 1st defendant have been conducted legally with water that is pumped from a source of water for residents in the surrounding area which lacks water supply and that it is not true that the spillage of water created ditches, waters and other depressions. Currently, these ditches, craters and depressions are characteristic of the terrain of the area subject of this matter and have been further escalated by locals in the area digging for stones. Due to the terrain of the area the ditches will be filled with rain water and a visit to the site would show there is no water at all. Further the plaintiffs' property is some distance away from the 1st defendant premises and there have been no complaints from premises that are closer to the 1st defendants' premises than that of the plaintiffs.

The defendants are not privy to the circumstances surrounding the drowning of Davis Mwape Junior save to highlight that he did not drown on the 1st defendant's premises. Neither are the defendants privy to any communication with the police. The plaintiffs have not provided any medical report as evidence of illness suffered by the plaintiffs' children and grandchildren and without any medical records the court should not entertain these allegations. Neither have the plaintiffs shown any damage to their property.

In their affidavit in reply, the plaintiffs more or less repeated the contents of their affidavit in support of this application, save to add that the 1st defendant has suspended the use of large pipes that were pointing to lot No. 6484/M due to the water volumes and has taken some of the pipes to the other side of the pit.

At the hearing counsel for the plaintiffs relied on the affidavit in support and in reply as well as their skeleton arguments and list of authorities all filed on the 15th March 2019.

In opposing the application counsel for the defendants relied on the affidavit in opposition. The court was referred to the case of **Greyford Manda vs. Winstone Chibwe (sued in his capacity as Secretary General of united Party for National Development)**¹ where the court held that the granting of an injunction must serve a useful purpose. Counsel argued that the application for an interim injunction in *casu* is quite specific as it is seeking to restrain the defendant from continuing to discharge water and for the immediate removal of the pipe allegedly discharging water onto the plaintiffs property. Counsel argued further that the plaintiffs, in their affidavit in reply, had admitted that the pipe had already been removed.

It was counsel's considered view that there was no basis upon which this trial court could grant an injunction and that the alleged damages suffered by the plaintiffs are issues that could be determined at trial.

In reply counsel for the plaintiffs argued that the principles for granting an injunction were clearly espoused in the celebrated cases of **American Cynamid vs Ethicon Ltd**² and **Shell & BP Zambia Ltd vs Canidaris & Others**³. Counsel urged this court to look at the cases of **Preston vs. Luck**⁴ and **Ndove vs National Educational Company Zambia Limited**⁵ and differentiate these cases from the **Greyford Manda vs. Winstone Chibwe** case.

Counsel urged this court to grant the injunction.

I am indebted to counsel for their arguments and submissions which I have taken into consideration.

The Supreme Court has guided in the case of **Shell & BP (Zambia) Limited vs Conidaris and others** that;

"A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury, mere inconvenience is not enough"

A perusal of the Writ of Summons and Statement of Claim indicates that the right to relief is not clear, with regard to the application for an injunction. I say so because as rightly pointed at by counsel for the defendants, the plaintiffs have admitted that the pipe that was discharging water onto the plaintiffs' property has since been removed. Further, a perusal of the summons for an injunction shows that the main issue for which relief was being sought was the stoppage of the discharge of the water, emissions and effluent and removal of the pipe that was discharging the said water, emissions and effluent onto the plaintiffs' property.


Consequently, I agree with counsel for the defendants that a grant of an injunction in this scenario, as requested, serves no useful purpose as the pipe that was discharging water, effluent or emission has since been removed.

Further, a perusal of the plaintiffs' claims reveals four separate heads of claims for damages. The Supreme Court has guided in the case of **Kekelwa Samuel Kangwa vs David Nkhata**⁶ that where a relief of damages is included in the originating process, then this serves as an acknowledgment that damages would serve as adequate compensation and that in such a case there is therefore no irreparable injury to be suffered.

On the basis of these authorities I find that the plaintiffs' application lacks merit as it has not shown the required elements for the granting of an injunction. The plaintiffs' application is denied and dismissed accordingly. Each party bears their own costs.

Leave to appeal is granted.

Dated the.....*20th*.....day of *July*.....2020



Ruth Chibbabbuka
JUDGE